IN THE HIGH COURT OF JUSTICE **CL-2023-000824**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Neutral Citation Number: [2024] EWHC 242 (Comm)

MONDAY 5TH FEBRUARY 2024

Before

HHJ PELLING KC

BETWEEN:

SAUDI ARABIAN AIRLINES CORPORATION

Claimant/Applicant

-v-

(1) INTERNATIONAL AIRFINANCE CORPORATION
(2) - (50) VARIOUS LESSORS
(companies registered in the Cayman Islands)

Defendants/Respondents

CHARLES BÉAR KC and **GILES ROBERTSON** (Instructed by **Norton Rose Fulbright LLP**) appeared on behalf of the Claimant

MICHAEL McLAREN KC and **JOSEPH LEECH** (Instructed by **Allen & Overy LLP)** appeared on behalf of the Defendant

APPROVED JUDGMENT

1. JUDGE PELLING: This is the hearing of an application for interim injunctive relief by an airline that is the lessee of 49 aircraft from the lessor defendants. The application was issued on 29 December 2023 and annexed to it was the draft of the order sought. The relief sought is broadly to prevent the defendants from relying on various notices of default that the defendants have issued under the terms of the leases with the claimant, and to prevent the defendants from issuing further notices in the future other than by giving the longer of two alternative periods of notice. The defendant maintains that the relief sought by reference to a notice dated 5 October 2023 is no longer necessary because the defendants have said they no longer rely on it. The claimants maintain that this exposes them to the risk that the defendants will resile from that indication unless the order is maintained. I agree with that but invited Mr McClaren KC, who appears on behalf of the defendant, to give an undertaking on its behalf that it will not rely on the notice prior to the trial of the claim. If that undertaking is forthcoming then the earlier order can be discharged.

2. Mr McLaren's clients do not resist the relief sought in paragraphs 2(iii) and 2(iv) of the draft order. The focus of attention at the hearing was therefore on three distinct issues:
    a. Whether the claimant has shown a sufficiently serious triable issue in relation to the notices issued by the defendant, dated 30 November and 1 December 2023, to pass the threshold condition identified in American Cyanamid v Ethicon Ltd [1975] AC 396;
    b. Whether the claimant has shown a sufficiently triable issue to require any notice of default, under clause seven and the relevant parts of clause 9, to be given a 45 as opposed to a 20 day period of notice; and

c. What if any fortification for the cross undertaking in damages should the claimant be required to provide. In that connection, on its application for without-notice relief, the claimant offered and I accepted fortification of $5 million over to a return date. The defendant maintains that there should be fortification in a sum of between about $20 million and $450 million odd. The claimant maintains that this is excessive on any view, and that no or no further fortification should be ordered applying the established principles in this area.

3. The claimant is the or a national airline of Saudi Arabia. It is ultimately owned by the government of Saudi Arabia. It operates flights both regionally, using principally the aircraft it leases from the defendants, and also globally using long-haul aircraft. There is no evidence as to whether the aircraft that the claimant operates (other than those leased from the defendants) are owned by the claimant or leased, and if owned whether any borrowing is secured against the other aircraft and if it is, in what sums. It is not suggested that the claimant has any assets in the United Kingdom. I return to these issues in further detail when I consider fortification. That part of the judgement will have to be given in private initially, because both parties have agreed that the evidence and submissions relevant to that issue are to be treated as confidential and the part of the hearing relevant to fortification took place in private. Once this judgment has been given I will invite further submissions as to whether the part of the judgment relating to fortification should be published either in whole or, if necessary, in redacted form. I remind all parties at this stage that the touchstone test in relation to that issue is necessity, with the default position being strongly in favour of publication.

4. I now turn to the triable issue questions that arise. In doing so, I record that the defendants do not suggest that damages will be an adequate remedy if otherwise the claimant has shown a sufficiently arguable triable issue, or that damages would not be an adequate remedy if ultimately the injunctions are granted and shown subsequently to have been wrongly granted, subject to the issue concerning fortification.

5. It is necessary that I start with the terms of the lease. Before turning to those terms I should record a submission by Mr McLaren that I should not hesitate to resolve any issues of construction between the parties, on the basis that in this case there is no factual matrix evidence outside the four corners of the lease which is relevant or which is relied upon by either party, much less matrix evidence that is in dispute. Mr Béar KC, who appears for the claimant, maintains that that is a dangerous course that ought not to be undertaken at all or should be undertaken only in the clearest of cases.

6. As is well known, in the context of summary judgment applications courts are encouraged to resolve finally straightforward points of law and construction, in the interest of ensuring the just disposal of disputes at proportionate cost. However, this is not a summary judgement application; it is an application for an interim injunction. Whilst I cannot say there will never be any circumstances in which a court will finally resolve a contested construction issue on an application of this sort, the circumstances will be rare where to do so will be appropriate, not least because the parties to such an application will not have approached the hearing on the basis that any factual or legal issue will be resolved finally between them. Even if it is appropriate to resolve finally any issue of construction on an application of this sort, all the warnings that apply to undertaking such an exercise on a summary judgment application apply with equal if

not greater force. Even on a summary judgement application novel or difficult points of construction are usually best left for trial. My approach therefore will be to consider the issues that arise, applying the conventional test for an interlocutory injunction applications established by American Cyanamid v Ethicon Ltd (ibid.) unless any construction issue is sufficiently straightforward, simple and clear as to be capable of safe resolution at this stage.

7. I now turn to the leases, which are in similar form. They are dated in or around December 2015 but were amended and restated in March 2022. The defendants are the successors to the lessor interests. As might be expected the leases are lengthy and complex; it is necessary, however, to refer only to a limited number of terms for present purposes.

8. The lease starts with an extensive list of defined words and expressions, it includes a definition of "*Non-Material Covenants*" as meaning "*any covenant, condition or agreement which is not (a) material in nature, (b) referenced in Clause 7(a) and Clause 9(a)(viii) and (c) mentioned in any provision of Clause 17 other than Clause 17(d)*."

9. By clause 4(d) of the lease the claimant is required to provide a security deposit to the defendants, to be held by the defendants throughout the term of the lease "… *as security for the timely and faithful performance by Lessee of all of Lessee's obligations under this Lease*…". That clause expressly permits the defendant to apply the deposit in partial payment of any sum due under the lease from the claimant to the defendant, meet any sum payable in advance as a result of a default by the claimant, or to discharge losses or expenses incurred by the defendant as a result of any default

by the claimant under the lease. In the event the defendant applies any part of the security deposit the lessee can be required to make up the security to its full amount on five days' notice The total amount of the security deposit held is not in evidence; I was told (I think) it was $20 million in the aggregate. However that is not obviously consistent with the sum in Schedule 3 of the lease in evidence which suggests a rather higher aggregate figure. This provision is or may be material to the fortification issue.

10. The remainder of the lease provisions centrally relevant are clauses 7, 9 and 17 of the leases.

11. Clause 7 is concerned with information concerning and inspection of the leased aircraft. Clause 7(b) requires the claimant to provide certain information concerning the location, condition, and use to which the aircraft is being put, and to permit inspection of the aircraft, engines and documentation on 14 days' notice. The nature of the inspection permitted depends on whether the aircraft is undergoing a "C Check", which is a major engineering inspection and overhaul based on hours flown or the number of take-off and landing cycles undertaken.

12. Clause 9 is concerned with maintenance, modifications and replacement or overhaul of parts installed on the aircraft. It is important at this juncture to note that no one suggests that any of these aircraft have not been maintained to at least the standard required by the manufacturers of the aircraft, or to the high standards appropriate for public transport air-worthiness as required by all relevant regulators, or that any air-worthiness issues of any sort are engaged by this dispute. Rather, the lease requires that the aircraft be maintained to a standard in excess of the regulatory standards that apply, primarily for the purpose of ensuring that when the aircraft are returned at the

end of the lease they are returned in a condition that enables them to be re-let by the defendants or their successors speedily and at full value.

13. With that in mind, I turn to clause 9. Subclause (a) is concerned with maintenance and is immaterial for present purposes. Subclause (b) is concerned with the requirement to maintain the leased aircraft to the same standard as other aircraft operated by the claimant and again is irrelevant for present purposes.

14. Subclauses (c) and (d) are concerned with replacement of parts and are material to the present dispute. Clause 9(c) provides (so far as is material) that the claimant, "... *may, at its own cost and expense, cause to be removed any Parts, ... provided that Lessee shall immediately replace such Parts, at its own cost and expense*…". By clause 9(d) "… *no Part that is replaced shall have more than 15% higher accumulated Hours or 15% higher accumulated Cycles than the Airframe total Flight Hours and Airframe total Cycles*." However, clause 9(e) operates in effect as an exception to clause 9(d), by enabling the defendant to install a replacement part that does not satisfy the 15 percent rule set out in clause 9(d) as a temporary replacement where compliance with clause 9(d) would result in "… *an aircraft on ground (AOG) or other similar critical disruption of the operation of the Aircraft*; …" but subject to the requirement in clause 9(e)(vi) that "*Lessee is using all reasonable efforts to remove the replacement part and replace it with the Part it replaced or with a part complying with Clause 9(d) above as soon as reasonably practicable after it is installed on the Aircraft but, in any event, no later than (a) (x) in the case of a part with a prescribed life limit, prior to the expiration of its life limit; or (y) in the case of other parts, when the part is required to be replaced pursuant to the Manufacturer's Aircraft Maintenance Manual or the applicable Component Maintenance Manual (as*

applicable) and (b) prior to redelivery of the Aircraft in accordance with this Agreement, whichever is earliest. …"

15. Events of default are defined by clause 17 of the lease. For present purposes clause 17(d) is material, it provides, "*Any one or more of the following occurrences or events shall constitute an Event of Default: ... (d) Lessee shall fail to perform or observe any other covenant, condition or agreement to be performed or observed by it pursuant to this Lease or any other Operative Agreement and such failure shall continue for a period of twenty (20) calendar days or, in the case of a Non-Material Covenant, forty-five (45) calendar days, in each case after the date on which notice thereof is given by Lessor to Lessee, ...*".

16. The lease provides for the payment of a maintenance payment by the defendant to the claimant. By default it is payable on the expiry date of the lease, "… *or immediately upon the occurrence of an Event of Default ...*", - see Schedule 4, paragraph 1. It goes without saying that the maintenance sum payable in the event of default is very substantial. Although any sum paid by the claimant to the defendants as a maintenance payment is repayable to the claimant in the event the claimant performs the relevant maintenance task, the effect of Schedule 4 is to require the claimant to carry out and pay for the relevant maintenance event before it can recover the maintenance payment from the defendants. In these circumstances the effect of a maintenance payment becoming payable by the claimant to the defendant in advance of the expiry of the lease as a result of an event of default occurring will be to impose significant financial prejudice on the claimant and strengthen substantially the defendant's financial and commercial position as against the claimant. In addition,

various other draconian remedies become available to the defendants by operation of clause 18 of the lease as and when an event of default occurs.

17. As I said earlier, the notices of default in dispute are two in number and concern aircrafts MSN 1734 and MSN 8428. That relating to MSN 1734 is dated 30 November 2023 and was issued following the inspection of the aircraft by a third party service provider instructed by the defendants (SGI Aviation Services B.V.). It purported to identify various breaches of clause 9(d) - see paragraphs four and five of the notice, which then continues "… *If the Defaults continue for more than 20 calendar days after this notice, this will constitute an Event of Default under clause 17(d) of the Lease and the Lessor will then be entitled to exercise any or all of its rights and remedies under the Lease* …". A spreadsheet setting out the various alleged defaults was attached to the notice.

18. On 1 December 2023 the defendant served a similar notice in respect of aircraft MSN 8428, also referring to clause 9(d). If the breaches alleged in the 1 December 2023 notice are non-material then if only one is justified then no event of default can occur unless at least four other non-material breaches have occurred in the previous twelve months. It is common ground that this means that the notices to which I have referred, to be effective in combination need to show at least six non-material breaches to which there is no realistically arguable answer if the defendant is to succeed in showing there is no triable issue in relation to the notices. As will be apparent from the text of the notice, each purported to give only 20 days' notice to remedy. Neither referred at all to clause 9(e)(vi).

19. Turning now to the issues that arise, the first point made by the claimant is that the notices are defective in a technical sense. The claimant submits that clause 17(d)

requires that notice to identify the breach relied on. It is said that a notice that alleges a breach of clause 9(d) is incomplete, since it asserts that clause 9(d) is breached only if clause 9(e) is also not met, and that is not mentioned anywhere in the notice. It is said therefore that the notices are technically defective because of that omission. I do not accept that this passes the serious arguability threshold. In my judgement clause 9(e)(vi) is permissory in nature, with the claimant being able to rely on it in answer to a notice of default based on clause 9(d). It does not require the defendants to show that it is not or is no longer available to the claimant when serving a notice based on breach of clause 9(d). Whether the requirements of clause 9(e)(vi) has been or is being complied with is a matter initially exclusively within the knowledge of the claimant, and it is for the claimant to assert reliance on it when served with notice of default relying on an alleged breach of clause 9(d). Once that has occurred, the question whether the claimant is using all reasonable efforts or has used all reasonable efforts to replace the temporary replacement part is a question of fact to be resolved ultimately at a trial, or a summary judgment application, unless agreement can be reached. Thus, while I accept that clause 9(b)(vi) is capable of providing the claimant with a factual defence to the claim that it is in default by failing to comply with clause 9(d), I do not accept the notice of default that fails to address that issue are by definition defective.

20. The claimant next submits that to serve a notice with many complaints that are not in the end relied on is itself a defective notice. I fully accept that the spreadsheets attached to the notices I have referred to, contained numerous allegations that the defendants have chosen not to rely on for the purposes of this application. I do not understand any of those points to have been permanently abandoned however.

They will be relied upon by the defendant at trial. Aside from that point, I do not accept that the lease requires the defendant to serve a separate notice for each alleged technical breach. That would serve no commercial or any other utility because precisely the same evaluation exercise would have to be undertaken by all concerned, whether separate notices or a composite notice with a spreadsheet particularising each alleged breach is served. Calculating the number of breaches for the purposes of clause 17(d) can as easily be calculated using the spreadsheet as a flurry of individual notices, or should be as the requisite particulars are provided on the spreadsheet.

21. In my judgment, therefore, the existence of serious triable issues depends on, firstly, whether the claimant has demonstrated a serious issue for trial as to whether in the circumstances it is entitled to rely on clause 9(b)(vi) in relation to each alleged breach that the defendant relies on to defeat the application, which depends on the effect of the phrase "*is using all reasonable efforts*" in clause 9(b)(vi) and, secondly, whether it is realistically arguable that clause 9(d) is a non-material covenant that merits a notice period of 45 not 20 days. If these points are seriously arguable, then it would next be necessary to consider whether a notice giving only 20 days' notice would be at least realistically and arguably invalid.

22. Turning the first of these issues, the defendants' case in relation to the limited number of defects on which it relies on this application is that on a true construction of the provisions to which I have referred, the defendant is required to purchase a new part and install it no later than the next following major

maintenance event for the aircraft concerned, which for MSN 1734 is accepted by the defendant to be a "C" check scheduled to take place between 17 October and 24 November 2023. Its reasoning can be traced through by reference to one part alone. Item number 47 on the schedule to the relevant notice of default is for a multifunction control and display unit which was installed on 20 September 2022. It is alleged it did not comply with clause 9(d) because it exceeded the 115 per cent rule. The defendants say a new one could have been sourced from Airbus but its only evidence as to availability is that as at 17 January 2024 the lead time for that part was 60 days. However, the defendant maintains that, if that was the position on 20 September 2022, then the defendant should have ordered the part and held it for the next "C" check and had it then installed or ordered it just in time for that "C" check, again so as to enable it to be installed of course at that maintenance exercise. There is no evidence as to the lead time for this particular part either on that date or any date thereafter down to the date when the C check had been scheduled to take place.

23. The claimant maintains that there are a number of objections to this as an approach. First, there is no evidence that the parts concerned were available at all, much less available within the timeframe suggested as applicable on 17 January 2024. Whilst there is no evidence that assists on that, there is a suggestion that there might have been an issue in relation to at least some of the parts, as is apparent, for example, from what the defendant says about item 20 in relation to MSN 8428. Whilst this might be a point of limited effect, the reality is that the defendant could have chosen to obtain the information relevant to the date when it maintains the items should have been ordered but did not or was able to. On an issue like this the

defendant would have to prove its point to a summary judgment standard if it was to succeed in establishing that there was no realistically arguable issue meriting the grant of an interlocutory injunction and, in my judgment, it has not done so.

24. More generally, what all reasonable efforts require is to my mind at least in part a contextual question. Firstly, it is realistically arguable that the clause should not be construed so as to require the claimant to restore the aircraft at the end of the lease in a better condition than 115 per cent requirements require. Whether that would be so in any particular case would require a factual analysis of the life or cycle life of any particular part, the number of times it would have to be replaced before the aircraft was returned at the end of the lease and possibly a cost-benefit analysis of replacing a part with one that was new for fewer times than a series of pre-used parts with sufficient life left which might necessitate numerous further replacements during the lease life of the aircraft. I agree with Mr Bear's submission that this issue cannot be resolved other than at trial and particularly not on an application of this sort. I say nothing about a summary judgment application when both parties will have had an opportunity to consider these issues in more detail. In some cases the lead time alleged by the defendants are not accepted by the claimants and I also accept that it is realistically arguable that the claimant is entitled to attempt to acquire a time compliant pre-used item before ordering a new one and that might affect lead times and may justify a longer delay in replacement than would result from ordering new replacement parts. Finally I accept that it is realistically arguable that all reasonable efforts would not require the claimant to extend the time taken for a C check in order to install replacement parts or that unplanned service stops should be used to install replacement parts if there are

commercially more sensible ways of carrying out that exercise. These are all issues for trial.

25. Turning now the notice period, this is relevant primarily now to paragraph 2.6 of the draft order but also is relevant to the validity of the 30 November and 1 December notices, each of which purport to require remedy within 20 rather than 45 days. The question depends on the meaning of "*non-material covenant*" in clause 17(d). If it is realistically arguable that the notice period should have been 45 and not 20 days' notice then it is realistically arguable that notices that purported to give the lesser period of notice are invalid.

26. As I have said, the contractual definition of a non-material covenant suggests it means a covenant other than one mentioned in clause 17(d). That appears to me to be circular and unhelpful since clause 17(d) refers to both material and non-material covenants. It is for that reason that the parties focus on the requirements of the definition that to be a non-material covenant it must not be material in nature. That too is unhelpful is providing a clear and unequivocal answer to what is a material clause and what is not. Resolving that question will therefore involve an analysis of most if not all of the operative provisions within the lease in order to arrive at an understanding of what reasonable parties in the position of the claimant and the defendant would have meant by a clause that was material in nature. Although currently there is no factual matrix evidence available, it is difficult to see how a question of that sort can be resolved without at least some aviation industry matrix evidence. As I said on the without notice application, this may not have been the strongest point available to the claimants, but it is precisely the sort of construction issue a court should be cautious about

attempting to resolve on a summary judgment application and is one that a judge should be all the more cautious about attempting to resolve on an application of this sort. It is at least realistically arguable that the parties intended clause 17(d) to be a non-material covenant because it is concerned, as I have said, with imposing technical obligations over and above those required by airworthiness and regulatory requirements, ultimately for the commercial benefit of the defendants at the end of the lease. It is apparent from the scope of the parts relied upon by the defendant that the reach of the clause is potentially enormous and the consequences that follow from a breach are profound financially and commercially in relation to parts of minimal value, or at least potentially so.

27. In my judgment, therefore, this issue is one that ought to be resolved at trial where it can be considered in more detail and with the forensic analysis available only at trial. It is nowhere near the sort of straightforward construction exercise that can be resolved on an application of this sort. In those circumstances I will grant the orders sought in paragraph 2.5 and 2.6 of the draft order.

28. I now turn to the fortification order and direct that the court now goes into private session.

(The Judgment then continued in private session)